

1 Allen Ruby, Esq. SB #47109
2 Glen W. Schofield, Esq. SB #47308
3 Steven A. Ellenberg, Esq., SB #151489
4 RUBY & SCHOFIELD
5 125 South Market Street, Suite 1001
6 San Jose, California 95113
7 Telephone: (408) 998-8500

8 Attorneys for Plaintiff

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12 SANTANA ROW HOTEL PARTNERS, L.P.,

13 Plaintiff,

14 v.

15 ZURICH AMERICA INSURANCE
16 COMPANY and GALLAGHER-
17 PIPINO, INC.,

18 Defendants.

CASE NO.

05 00198

COMPLAINT FOR DAMAGES

JURY TRIAL DEMANDED

HRL

18 Comes now plaintiff SANTANA ROW HOTEL PARTNERS, L.P. ("plaintiff" or
19 "Hotel Partners") and alleges as follows:

20 PARTIES

21 1. Plaintiff is a Texas limited partnership. Plaintiff built, and now operates, the
22 Valencia Hotel (the "Hotel"), a luxury hotel located at 355 Santana Row, San Jose,
23 California.

24 2. Plaintiff is informed and believes that defendant Zurich America Insurance
25 Company ("Zurich") was and now is a corporation duly organized and existing under the
26 laws of the State of Illinois, with its principal place of business in the State of Illinois. On
27 information and belief, Zurich is licensed to transact and is transacting the business of
28 insurance in the State of California.

COMPLAINT FOR DAMAGES; JURY TRIAL DEMANDED

7 4. Plaintiff is informed and believes and thereon alleges that at all times herein
8 mentioned, each of the defendants was the agent or employee of each of the remaining
9 defendants, and in doing the things hereinafter alleged, was acting within the course and
10 scope of such agency.

12 5. This Court has subject matter jurisdiction over this action pursuant to 28
13 U.S.C. §1332 because there is complete diversity between plaintiff and defendants, and the
14 amount in controversy in this action exceeds \$75,000.00 exclusive of interest and costs.

15 6. Venue is proper in this district under 28 U.S.C. §1391 in that the events giving
16 rise to these claims occurred in this district and the defendants transact business here.

18 7. The Hotel occupies real estate which plaintiff leases from FRIT San Jose
19 Town and Country Village, L.L.C. ("FRIT"). The Hotel is part of a large mixed use,
20 retail/residential community developed by FRIT.

21 8. While the Hotel was under construction, and before the Fire, for valuable
22 consideration Zurich issued its insurance policy number IM3184453-00 (the “Policy”),
23 which insured plaintiff and others against losses caused by fire and other risks.

24 9. Attached to this Complaint as Exhibits "A" and "B" respectively, are copies of
25 Certificates of Insurance dated August 29, 2002 and January 8, 2003 which confirm that
26 plaintiff was insured under the Policy.

10. On August 19, 2002, while the Hotel was under construction, there was a fire at the Santana Row development (the "Fire"). The Hotel had been scheduled to open on or

1 about January 1, 2003, but because of the massive damage and destruction caused by the
2 Fire, the Hotel was not fully operational until more than a full year after its scheduled
3 opening. The Fire caused losses to the plaintiff, including without limitation rental income
4 loss, extended general conditions, and soft costs in excess of \$10 million.

5 11. All of the losses suffered by plaintiff because of the Fire are covered by the
6 Policy.

7 12. More than two years after the Fire, in September 2004, Zurich made a partial
8 payment to plaintiff under the Policy in the sum of \$713,839.00 for losses suffered by
9 plaintiff because of the Fire.

10 13. Also in September 2004, Zurich extended in writing through January 31,
11 2005, all statutes of limitation applicable to the claims asserted by plaintiff against Zurich in
12 this action.

13 14. On or about December 23, 2004, Zurich denied in writing plaintiff's claim for
14 payments under the Policy, except for the partial payment of \$713,839.00.

15 **FIRST CLAIM FOR RELIEF**
16 **(Breach of Contract Against Zurich)**

17 15. Plaintiff realleges and incorporates by reference each and every allegation
18 contained in paragraphs 1 through 14 above.

19 16. Plaintiff is an insured under the Policy.

20 17. Plaintiff has performed all of its obligations under the Policy, or was excused
21 from performance.

22 18. Plaintiff has demanded payment under the Policy in an amount to which
23 plaintiff is entitled, but Zurich has failed and refused and continues to fail and refuse to pay
24 plaintiff's covered losses, except for the partial payment of \$713,839.00 in September,
25 2004.

26 19. As a proximate result of Zurich's failure and refusal to comply with its
27 obligations under the Policy, plaintiff has been damaged in a sum in excess of \$10,000,000,
28 together with interest thereon at the legal rate.

1 WHEREFORE, plaintiff prays judgment as hereinafter set forth.

2 **SECOND CLAIM FOR RELIEF**
3 **(Tortious and Bad Faith Breach of Contract Against Zurich)**

4 20. Plaintiff realleges and incorporates by reference each and every allegation
5 contained in paragraphs 1 through 19 above.

6 21. As described above, Zurich has tortiously and in bad faith breached its
7 obligation to plaintiff under the Policy and the law in the following fashion:

8 a. Zurich has unreasonably delayed in its payment under the Policy.

9 b. Zurich has failed to effectuate a prompt, fair and equitable payment of
10 plaintiff's claims.

11 c. Zurich has denied that it has any obligation to plaintiff despite
12 representations made to plaintiff by Zurich and its agent Gallagher that the
13 Policy covers the damages claimed by plaintiff and despite Zurich's
14 concession that plaintiff is a named insured through its unconditional payment
15 to plaintiff.

16 22. As a direct and proximate result of Zurich's failure to pay benefits under the
17 Policy, plaintiff has been damaged in an amount in excess of \$10,000,000 plus interest.

18 23. As a further, direct and proximate result of Zurich's wrongful conduct as
19 herein alleged, plaintiff has been required to retain counsel in order to attempt to recover the
20 benefits owed to it under the Policy as an insured.

21 24. Zurich acted in conscious disregard of the rights of plaintiff, and was and has
22 been guilty of malice, oppression and fraud in committing the acts described in this
23 Complaint. The conduct of Zurich warrants an award of punitive damages in an amount
24 appropriate to punish Zurich and deter others from engaging in similar wrongful conduct.

25 WHEREFORE, plaintiff prays judgment as hereinafter set forth.

26 /////

27 /////

28 /////

THIRD CLAIM FOR RELIEF
(Breach of Third Party Beneficiary Contract
Against Gallagher and Zurich)

25. By letter dated December 23, 2004, Zurich denied that it ever issued a policy of insurance to plaintiff, and further denied that it insured plaintiff in any manner whatsoever for losses suffered in the Fire. Although plaintiff disputes these denials, plaintiff pleads the Third and Fourth Claims for Relief as alternative pleadings under Rule 8(e)(2), Federal Rules of Civil Procedure.

26. Plaintiff incorporates by reference paragraphs 1-7, 10, 13 and 14 above.

27. On or about March, 2001, FRIT on the one hand and Gallagher and Zurich on the other hand entered into a written contract under which Gallagher would procure a policy of insurance from Zurich that would insure plaintiff against a variety of hazards, including fire, associated with construction of the Hotel.

28. This contract among FRIT, Gallagher and Zurich was expressly made for plaintiff's benefit to provide plaintiff with insurance against a variety of hazards, including fire, while the Hotel was under construction. Gallagher and Zurich had actual knowledge that the contract was made for plaintiff's benefit.

29. On information and belief, FRIT fulfilled all of its obligations under this contract.

30. Gallagher and Zurich breached the contract by failing to obtain a policy of insurance which insured plaintiff from a variety of risks, including fire, associated with construction of the Hotel.

31. As a result of the breach by Gallagher and Zurich, plaintiff has suffered damage in excess of \$10 million.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

FOURTH CLAIM FOR RELIEF
(Fraud Against Gallagher and Zurich)

32. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1-7, 10, 13, 14 and 25-31 above.

1 33. Gallagher and Zurich intentionally defrauded plaintiff as follows.

2 34. On or about August 29, 2002, Gallagher and Zurich prepared and delivered to
3 plaintiff the "Evidence of Property Insurance" which is attached to this Complaint as
4 Exhibit "A". This document purports to show on its face that plaintiff is insured under
5 Zurich American Insurance Policy No. IM318445300, with insurance coverage limits
6 exceeding \$200 million.

7 35. Exhibit "A" is a fraud, and was known to be fraudulent by Gallagher and
8 Zurich when they prepared, made, and delivered it to plaintiff. Plaintiff was not insured
9 under Policy No. IM318445300, or any other policy of insurance issued by Zurich.
10 Gallagher and Zurich prepared and delivered this false evidence of property insurance with
11 the intent to conceal the breach of contract described in the Third Claim for Relief above,
12 and to deceive plaintiff into believing that it was insured for losses suffered in the Fire.

13 36. Plaintiff reasonably relied upon the false evidence of property insurance to its
14 detriment, and suffered damage as a result.

15 37. On or about January 8, 2003, defendants Gallagher and Zurich prepared and
16 delivered to plaintiff the "Evidence of Property Insurance" attached to the Complaint as
17 Exhibit "B". This document purports to show on its face that plaintiff is insured under
18 Zurich American Insurance Policy No. IM318445300, with insurance coverage limits
19 exceeding \$200 million.

20 38. Exhibit "B" is a fraud, and was known to be fraudulent by Gallagher and
21 Zurich when they prepared, made, and delivered it to plaintiff. Plaintiff was not insured
22 under Policy No. IM318445300, or any other policy of insurance issued by Zurich.
23 Gallagher and Zurich prepared and delivered this false evidence of property insurance with
24 the intent to conceal the breach of contract described in the Third Claim for Relief above,
25 and to deceive plaintiff into believing that it was insured for losses suffered in the Fire.

26 39. Plaintiff reasonably relied upon the false evidence of property insurance to its
27 detriment, and suffered damage as a result.

28 ////

PRAYER

1. For compensatory damages against each defendant in excess of \$10,000,000;
2. For exemplary and punitive damages according to proof;
3. For attorneys fees and costs of suit;
4. For such other and further relief as the Court deems proper.

RUBY & SCHOFIELD

BY

ALLEN RUBY
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

DATED: January 1, 2005

RUBY & SCHOFIELD

By:

ALLEN RUBY
Attorneys for Plaintiff

I:\SANTANA ROW\P\District Court Complaint for Damages.doc

EXHIBIT A

08/28/2002 10:28 FAX 3307265748

GALLAGHER PIPINO

004

FRITSAN

ACORD EVIDENCE OF PROPERTY INSURANCE		DATE (MM/DD/YY)																											
THIS IS EVIDENCE THAT INSURANCE AS IDENTIFIED BELOW HAS BEEN ISSUED, IS IN FORCE, AND CONVEYS ALL THE RIGHTS AND PRIVILEGES AFFORDED UNDER THE POLICY.		08/29/02																											
PRODUCER Gallagher Pipino, Inc. 7600 Market Street P.O. Box 3849 Youngstown, OH 44513 PHONE 330 726-8177 FAIR No. Etk	COMPANY Zurich-American Insurance Co.																												
CODE: AGENCY CUSTOMER ID# 3779	SUB CODE: LOAN NUMBER 05/15/00 POLICY NUMBER TM 318445300 03/01/03 TERMINATED IF CHECKED																												
INSURED EDIT SAN JOSE TOWN & COUNTRY VILLAGE LLC Rockville, MD 20852-4041																													
PROPERTY INFORMATION LOCATION/DESCRIPTION Santana Row, San Jose, CA. Hotel Valencia																													
COVERAGE INFORMATION <table border="1"> <thead> <tr> <th>COVERAGE/PERILS/FORMS</th> <th>AMOUNT OF INSURANCE</th> <th>DEDUCTIBLE</th> </tr> </thead> <tbody> <tr> <td>Builders Risk Coverage:</td> <td></td> <td></td> </tr> <tr> <td> Limit of Liability: Hard Costs</td> <td>\$200,000,000</td> <td>\$25,000.</td> </tr> <tr> <td> Soft Costs:</td> <td>\$50,000,000</td> <td>14 days</td> </tr> <tr> <td>Sublimits of Insurance:</td> <td></td> <td></td> </tr> <tr> <td> In Transit:</td> <td>\$1,000,000.</td> <td>\$25,000.</td> </tr> <tr> <td> Onsite Storage:</td> <td>\$1,000,000.</td> <td>\$25,000.</td> </tr> <tr> <td> Earthquake:</td> <td>\$25,000,000.</td> <td>5% value</td> </tr> <tr> <td> Flood:</td> <td>\$25,000,000.</td> <td>\$25,000.</td> </tr> </tbody> </table>			COVERAGE/PERILS/FORMS	AMOUNT OF INSURANCE	DEDUCTIBLE	Builders Risk Coverage:			Limit of Liability: Hard Costs	\$200,000,000	\$25,000.	Soft Costs:	\$50,000,000	14 days	Sublimits of Insurance:			In Transit:	\$1,000,000.	\$25,000.	Onsite Storage:	\$1,000,000.	\$25,000.	Earthquake:	\$25,000,000.	5% value	Flood:	\$25,000,000.	\$25,000.
COVERAGE/PERILS/FORMS	AMOUNT OF INSURANCE	DEDUCTIBLE																											
Builders Risk Coverage:																													
Limit of Liability: Hard Costs	\$200,000,000	\$25,000.																											
Soft Costs:	\$50,000,000	14 days																											
Sublimits of Insurance:																													
In Transit:	\$1,000,000.	\$25,000.																											
Onsite Storage:	\$1,000,000.	\$25,000.																											
Earthquake:	\$25,000,000.	5% value																											
Flood:	\$25,000,000.	\$25,000.																											
Delay in Completion Endorsement, Extended Period of Indemnity: 356 days 365																													
CANCELLATION THE POLICY IS SUBJECT TO THE PREMIUMS, FORMS, AND RULES IN EFFECT FOR EACH POLICY PERIOD. SHOULD THE POLICY BE TERMINATED, THE COMPANY WILL GIVE THE ADDITIONAL INTEREST IDENTIFIED BELOW 90 DAYS WRITTEN NOTICE, AND WILL SEND NOTIFICATION OF ANY CHANGES TO THE POLICY THAT WOULD AFFECT THAT INTEREST, IN ACCORDANCE WITH THE POLICY PROVISIONS OR AS REQUIRED BY LAW.																													
ADDITIONAL INTEREST <table border="1"> <tbody> <tr> <td>NAME AND ADDRESS</td> <td>MORTGAGEE</td> <td><input checked="" type="checkbox"/> ADDITIONAL INSURED</td> </tr> <tr> <td>Santana Row Hotel Partners, LP</td> <td>LOSS PAYEE</td> <td></td> </tr> <tr> <td>Hotel Valencia</td> <td>LOAN #</td> <td></td> </tr> <tr> <td>Santana Row</td> <td>AUTHORIZED REPRESENTATIVE</td> <td></td> </tr> <tr> <td>Jose, CA. 95128</td> <td></td> <td></td> </tr> </tbody> </table>			NAME AND ADDRESS	MORTGAGEE	<input checked="" type="checkbox"/> ADDITIONAL INSURED	Santana Row Hotel Partners, LP	LOSS PAYEE		Hotel Valencia	LOAN #		Santana Row	AUTHORIZED REPRESENTATIVE		Jose, CA. 95128														
NAME AND ADDRESS	MORTGAGEE	<input checked="" type="checkbox"/> ADDITIONAL INSURED																											
Santana Row Hotel Partners, LP	LOSS PAYEE																												
Hotel Valencia	LOAN #																												
Santana Row	AUTHORIZED REPRESENTATIVE																												
Jose, CA. 95128																													

EXHIBIT B

DATE (MM/DD/YY)
01/08/03